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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
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Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination	)	WC Docket No. 05-276

PETITION FOR DECLARATORY RULING

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SUMMARY

VarTec Telecom, Inc. ("VarTec") seeks a declaratory ruling that VarTec is not required to pay access charges to Southwestern Bell Telephone Company ("Southwestern Bell") or any other terminating local exchange carrier ("LEC") when enhanced service providers or other carriers deliver calls directly to Southwestern Bell and the other terminating LECs for termination or to other carriers who ultimately deliver calls directly to Southwestern Bell for termination, regardless of whether these calls are originated by LECs or commercial mobile radio service ("CMRS") providers. VarTec also requests that the Commission declare that any attempts by Southwestern Bell or any other terminating LEC to collect access charges from VarTec in contravention of its tariff violates sections 201(b) and 203(c) of the Communications Act.

VarTec is not Southwestern Bell's or any other terminating LEC's "customer", as defined by Southwestern Bell's tariff and the tariffs of other LECs for such calls, because VarTec has not "subscribed" to Southwestern Bell's or any other terminating LEC's services, has had no say in how Southwestern Bell's or any other terminating LEC's service is provided, and its network is not the "customer" premises to which Southwestern Bell or any other terminating LEC provides its access service. Enhanced service providers, such as PointOne or Transcom, and other carriers arrange for what services Southwestern Bell or any other terminating LEC provides and how they are provided. It is therefore those enhanced service providers and other carriers who are responsible for paying access charges to Southwestern Bell and any other terminating LEC, if applicable.

While calls that VarTec delivers to enhanced service providers, such as PointOne or Transcom, or other carriers are originated by LECs, others are originated by CMRS providers.

VarTec also seeks a declaratory ruling by the Commission that intraMTA calls that originate from CMRS providers, transit the facilities of VarTec, PointOne and other carriers, and then terminate on Southwestern Bell's or any other terminating LEC's network are "local" calls that are exempt from interstate or intrastate access charges. Section 51.701(b)(2) of the Commission's rules and decisions by both the FCC and the courts make it clear that "traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges."

VarTec also requests a ruling by the Commission that Southwestern Bell and any other terminating LEC is required to pay VarTec for the use of VarTec's facilities to deliver transiting traffic, when intraMTA calls that originate on the networks of third-party CMRS carriers, transit VarTec's network and the networks of PointOne, Transcom and other carriers, and terminate on Southwestern Bell's and any other terminating LEC's network. In the *Texcom* decisions, the Commission held that a transiting carrier like VarTec is entitled to compensation from the terminating carrier for the use of its facilities to deliver transiting intraMTA CMRS ("local") traffic to the terminating carrier. Southwestern Bell and any other terminating LEC may then seek reimbursement for what it pays VarTec from the originating CMRS carriers, through section 251(b)(5) reciprocal compensation arrangements.

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PETITION FOR DECLARATORY RULING

VarTec Telecom, Inc. ("VarTec"), pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, hereby petitions the Commission for a declaratory ruling that: (1) VarTec is not required to pay access charges to Southwestern Bell Telephone Company ("Southwestern Bell") or any other terminating LEC when enhanced service providers, such as PointOne or Transcom Enhanced Services LLC ("Transcom"), or other carriers deliver calls to Southwestern Bell and the other terminating LECs for termination, (2) any attempts by Southwestern Bell or any other terminating LEC to collect access charges from VarTec in contravention of its tariff violates Sections 201(b) and 203(c) of the Communications Act, (3) such calls are exempt from the payment of access charges when they are originated by a commercial mobile radio service ("CMRS") provider and do not cross major trading area ("MTA") boundaries, and (4) Southwestern Bell and any other terminating LEC is required to pay VarTec for the transiting service VarTec provides when Southwestern Bell and any other terminating LEC terminate intraMTA calls originated by a CMRS provider. VarTec seeks this relief to resolve an actual controversy with Southwestern Bell over the applicability of access charges.

BACKGROUND

For some telephone calls it receives, VarTec pays enhanced service providers, such as PointOne or Transcom, and other carriers to complete the calls. The calls that VarTec delivers to such enhanced service providers or other carriers may be originated by a local exchange carrier ("LEC') or a CMRS provider. Many of these calls are intraMTA calls that originate on CMRS provider wireless networks.

According to its website, PointOne operates the largest voice over Internet Protocol ("VOIP") network in North America and offers the only VOIP class of service in the industry.[1] VarTec has been advised by Southwestern Bell that PointOne then forwards such calls to other carriers, such as Xspedius and McLeod. The other carriers then send the calls to Southwestern Bell for termination.

Similar cases exist with Transcom and other carriers. Transcom describes itself as a leading provider of telecommunications services worldwide with a VOIP network stretching into China, Mexico and Latin America.[2]

VarTec has no prior knowledge or control over what other carriers are chosen by PointOne or Transcom to deliver calls to Southwestern Bell or other terminating LECs. VarTec has no knowledge of the contractual relationships between PointOne and these other carriers, or Transcom and these other carriers. It also does not know the details of how the other carriers have arranged for Southwestern Bell or other terminating LECs to terminate these calls.

1 PointOne's website can be found at www.pointone.com PointOne is a subsidiary of Unipoint Holdings Company, Inc.

2 Transcom's website can be found at www.transcomus.com.

VarTec has no contractual or other business relationship with Southwestern Bell or other terminating LECs with respect to these calls. VarTec has not ordered service or facilities from Southwestern Bell or other terminating LECs for the termination of these calls. It is not VarTec, but other carriers, that specify the connection type, capacity, features, multiplexing and other functions they want from Southwestern Bell or other terminating LECs for the termination of these calls. Yet, while VarTec is not Southwestern Bell's "customer" for these calls, Southwestern Bell has threatened to assess VarTec access charges. Further SBC has contacted several of VarTec's wholesale customers and informed them of these threats against the company which has harmed and continues to harm VarTec's relationships with its customers.

ARGUMENT

Under the Administrative Procedure Act and the Commission's rules, the Commission has jurisdiction to "issue a declaratory order to terminate a controversy or to remove uncertainty."[3] The applicability of access charges to the calls described in this petition now presents a controversy that requires resolution by the Commission.

I. Because VarTec is not Southwestern Bell's or Any Other Local Exchange Carrier's Customer Under Access Tariffs for Calls That It Delivers To Enhanced Service Providers or Other Carriers, VarTec is not Required to Pay Access Charges to Southwestern Bell or Any Other Terminating Local Exchange Carrier for such Calls

When enhanced service providers, such as PointOne or Transcom, or other carriers deliver calls to Southwestern Bell or any other terminating LEC for termination, regardless of whether they are originated by LECs or CMRS providers, VarTec is not Southwestern Bell's or any other terminating LEC's "customer" and therefore is not required by its tariff to pay access charges. According to a well-settled rule of tariff interpretation, the interpretation that is more

3 5 U.S.C. § 554(c); 47 C.F.R. § 1.2.

favorable to VarTec is the one that the Commission should adopt. "[I]f there is ambiguity in tariffs they should be construed against the framer and favorably to users." Associated Press Request for Declaratory Ruling, 72 FCC 2d 760, 765 (1979) (quoting Commodity News Services, Inc. v. Western Union, 29 FCC 1208, 1213 (1960)).

Southwestern Bell's federal access service tariff defines "customer" as:

> [a]ny individual, partnership, association, joint-stock company, trust, corporation or governmental entity or any other entity which subscribes to the services offered under this tariff, including both Interexchange Carriers (ICs) and End Users.[4]

In order to "subscribe" to Southwestern Bell's access service, the tariff requires the "customer" to place an access order with Southwestern Bell that specifies all the information necessary for Southwestern Bell to provide and bill for the requested service.[5] The "customer" must provide Southwestern Bell with information concerning the number of trunks, directionality of the service, the entry switch, the features desired, the circuit facility assignment, the "customer" premises, the connection type, the interface group, the multiplexing locations, and the SS7 specifications.[6] The tariffs of other terminating LECs contain similar language.

VarTec has not "subscribed" to Southwestern Bell's or any other terminating LEC's access services with respect to the calls at issue in this petition and therefore is not Southwestern Bell's or any other terminating LEC's "customer" for those calls. VarTec has not placed an access order with Southwestern Bell or any other terminating LEC for the calls that enhanced service providers, such as PointOne or Transcom, and other carriers deliver to Southwestern Bell and other terminating LECs for termination. VarTec has also not provided Southwestern Bell or

4 Southwestern Bell Tariff F.C.C. No. 73, Section 2.7, Ist Revised Page 2-99, effective October 16, 1992.

5 Id. at Section 5.2.1(B), 4th Revised page 5-4, effective October 2, 2001.

6 Id. at Section 5.2.2, pp. 5-7.1 to 5-9, pp. 5-16, 5-17.

any other terminating LEC with the information its tariff requires as a prerequisite to the provision of access service for such calls. Furthermore, VarTec has no control over the requests for features, functions or specifications that Southwestern Bell or any other terminating LEC receives from enhanced service providers or other carriers for the termination of these calls or how enhanced service providers or other carriers use Southwestern Bell's or any other terminating LEC's services.

It is reasonable to require payment from these enhanced service providers or other carriers that determine what service Southwestern Bell and any other terminating LEC provides and how it is provided. Those enhanced service providers and other carriers, not VarTec, "subscribed" to Southwestern Bell's access service and the services of the other terminating LECs. This is true regardless of whether the calls are originated by a LEC or CMRS provider. It is enhanced service providers, such as PointOne or Transcom, and other carriers that make arrangements with Southwestern Bell and other terminating LECs for the termination of these calls that are Southwestern Bell's and the other terminating LECs' "customers" and responsible for paying Southwestern Bell and any other terminating LEC pursuant to its tariff.

The tariff's description of access service provides further support for this conclusion. Southwestern Bell's tariff defines switched access service as "a two-point communications path between a customer's premises and an end user's premises".[7] The tariffs of other terminating LECs contain similar language. For the calls that VarTec delivers to enhanced service providers, such as PointOne or Transcom, and other carriers, Southwestern Bell's facilities and the facilities of other terminating LECs do not connect to a VarTec premises relative to the terminating portion of the call, but instead connect to the premises of an enhanced service provider or

[7] Id. at Section 6.1, 12th Revised Page 6-6, effective June 13, 2003.

another carrier. Southwestern Bell's and any other terminating LEC's "customer" is the enhanced service provider or other carrier whose facilities are directly connected to Southwestern Bell's facilities and the facilities of any other terminating LEC, and it is that enhanced service provider or carrier who is responsible for paying access charges to Southwestern Bell and the other terminating LECs.

VarTec respectfully requests that the Commission eliminate any uncertainty and declare that it is enhanced service providers and carriers other than VarTec who are responsible for paying access charges to Southwestern Bell or any other terminating LEC for the calls at issue in this petition. For the calls that VarTec delivers to enhanced service providers, such as PointOne or Transcom, and others, VarTec is not Southwestern Bell's or any other terminating LEC's "customer", it has not ordered or subscribed to Southwestern Bell's or any other terminating LEC's access service, it has had no say in how Southwestern Bell's or any other terminating LEC's service is provided, and its network is not the "customer" premises to which Southwestern Bell or any other terminating LEC provides its access service relative to the terminating portion of the call. Under such circumstances, it would be inequitable and contrary to Southwestern Bell's tariff and the tariffs of other terminating LECs for Southwestern Bell or any other terminating LEC to assess access charges upon VarTec.

II. Southwestern Bell's or Any Other Terminating Local Exchange Carrier's Attempt to Collect Access Charges From VarTec Violates Sections 201(b) and 203(c) of the Communications Act.

Southwestern Bell is attempting to collect charges from VarTec for services provided to other carriers, rather than VarTec. This effort to collect charges by Southwestern Bell violates Sections 201(b) and 203(c) of the Communications Act, which prohibit carriers from engaging in such an unreasonable practice and demanding compensation *different from that set forth in their* tariffs.[8]

Pursuant to Rule 61.2, "in order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations."[9] A tariff that is not clear and explicit as required by Section 61.2 renders the tariff unreasonable and in violation of Section 201(b) of the Communications Act.[10] If it is determined that the terms of a tariff are unreasonable, the filed rate doctrine cannot validate such terms.[11]

A tariff is also unreasonable and in violation of Section 201(b) of the Communications Act if "it contains insufficient explanatory information".[12] Southwestern Bell's or any other terminating LEC's intent in promulgating its tariff regulations is irrelevant.

> [T]ariffs are to be interpreted according to the reasonable construction of their language and neither the intent of the framers nor the practice of the carrier controls. Thus, tariffs must be able to stand on their own, without further interpretation from the carrier.[13]

A carrier also violates Section 203(c) of the Communications Act if it attempts to collect charges in a manner inconsistent with its tariff.[14]

VarTec requests that the Commission issue a ruling declaring that any attempts by Southwestern Bell or any other terminating LEC to collect access charges from VarTec in contravention of its tariff violates Sections 201(b) and 203(c) of the Communications Act.

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8 47 U.S.C. §§ 201(b), 203(c).

9 47 C.F.R. § 61.2.

10 Halprin, Temple, Goodman & Sugrue v. MCI Telecommunications Corp., 13 FCC Rcd 22568, 22574, 22576, 22585 (1998).

11 Id. at 22579.

12 Id. at 22574.

13 Associated Press Request for Declaratory Ruling, 72 FCC 2d 760, 762 (1979).

14 United Artists Payphone Corp. v. New York Telephone Co., 8 FCC Rcd 5563, 5564, 5567 (1993).

Nowhere does Southwestern Bell's tariff and the tariffs of other terminating LECs explicitly and clearly state that VarTec is responsible for paying access charges on the calls VarTec delivers to enhanced service providers, such as PointOne or Transcom, and other carriers. To the contrary, Southwestern Bell's tariff and the tariffs of other terminating LECs state that VarTec is not the "customer" responsible for payment of those charges.

III. CMRS Provider Originated IntraMTA Calls that VarTec Delivers to Enhanced Service Providers and Other Carriers are Exempt From Access Charges.

Section 251(b)(5) of the Communications Act imposes a "dut[y]" on all local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." See 47 U.S.C. § 251(b)(5). The Communications Act establishes a system of negotiations and arbitrations in order to facilitate voluntary agreements between carriers to implement its substantive requirements. Under the Communications Act, "all local exchange carriers are required to establish reciprocal compensation arrangements in their interconnection agreements."[15] Both the originating carrier and the terminating incumbent local exchange carrier "have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the Act's goals."[16] If the originating and terminating carriers fail to reach an agreement through voluntary negotiations, either party may petition the relevant state public utility commission to arbitrate and resolve any open issue. The final agreement, whether negotiated or arbitrated, must be approved by the state commission.[17]

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15 Pacific Bell v. Pac-West Telecomm. Inc., 325 F.3d 1114, 1119 (9th Cir. 2003) (quotations and citations omitted).

16 Iowa Utils. Bd. v. FCC, 120 F.3d 753, 792 (8th Cir. 1997) ("Iowa Utils. Bd."), citing 47 U.S.C. §§ 252(c)(1), 252(a)(1).

17 Id., citing 47 U.S.C. §§ 252(b), 252(e)(1).

As held by several courts, the "comprehensive" process set out in sections 251 and 252 is the "exclusive" means for establishing arrangements for reciprocal compensation contemplated by the Communications Act's substantive provisions.[18] Neither carriers nor regulatory agencies may through a tariff filing "bypass' and "ignore" the "detailed process for interconnection set out by Congress" in the Communications Act.[19] That rule applies with even greater force to "unilateral" tariff filings that have not been ordered by the agency.[20]

Pursuant to its rulemaking authority, the FCC in 1996 released its Local Competition Order to implement the provisions of the Telecommunications Act of 1996.[21] The FCC had to determine which "telecommunications" (i.e. calls) are subject to "reciprocal compensation" for "transport and termination" under section 251(b)(5). In this regard, the FCC distinguished between "transport and termination" of "local" calls, and that for "long-distance" calls, the latter of which had historically been subject to access charges. Local Competition Order, ¶ 1033.

The FCC then "define[d] the local service area for calls to or from a CMRS network for the purposes of applying" sections 251 and 252 including the reciprocal compensation provisions of section 251(b)(5). Local Competition Order ¶ 1036. The FCC determined that for these purposes the MTA serves as the most appropriate definition for local service area for CMRS

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18 Verizon North, Inc. v. Strand, 309 F.3d 935, 939 (6th Cir. 2002); see also MCI Telecomms. Corp. v. GTE Northwest, Inc., 41 F. Supp.2d 1157, 1178 (D. Or. 1999); see generally Pacific Bell, 325 F.3d at 1127 ("the point of § 252 is to replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements"), Iowa Utils. Bd., 120 F.3d at 801 (noting "Act's design to promote negotiated binding agreements").

19 Verizon North, 309 F.3d at 941. See also TSR Wireless, LLC v. U.S. West Communs., Inc., 15 FCC Rcd. 11166, ¶ 29 (2000) (1996 Act and FCC's implementing regulations apply "regardless [of an inconsistent] federal or state tariff").

20 See Verizon North Inc. v. Strand, 367 F.3d 577, 584-85 (6th Cir. 2004) ("unilateral" tariff filing is "a fist slamming down on the [negotiating] scales").

21 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996) ("Local Competition Order").

traffic. Id. The FCC concluded that "section 251(b)5) reciprocal compensation", and not "access charges" would apply "to traffic that originates and terminates within a local calling area".[22] Local Competition Order ¶ 1034. "Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges."[23] Local Competition Order ¶ 1036. The FCC rulings described above are codified at 47 C.F.R. § 51.701(b)(2).

Every federal court to consider the issue has ruled that indirect interconnection through a transiting carrier like VarTec does not convert intraMTA "local" calls into "long distance" calls for which the transiting carrier must pay access charges or other compensation for transport or termination by other carriers. For example, in 3 Rivers Telephone Cooperative, Inc. v. U.S. West Communications, Inc., the court reasoned that the FCC's Local Competition Order "makes no distinction between such traffic [i.e., traffic delivered over a direct connection] and traffic that flows between a CMRS carrier and LEC in the same MTA that also happens to transit another carrier's facilities prior to termination."[24] The court held that, accordingly, "Qwest is not liable to plaintiffs for terminating access charges on CMRS (wireless) traffic that both originates and

[22] The Eighth Circuit has affirmed the FCC's determinations to require LECs to charge rates for the use of their networks to transport and terminate "local" calls that differ from the rates they are permitted to charge for the transport and termination of "long distance" calls. Competitive Telecomms. Ass'n. v. FCC, 117 F.3d 1068, 1073 (8th Cir. 1997).

[23] See also Local Competition Order, 11 FCC Rcd. at 16016, ¶ 1043 ("[w]e reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges").

[24] 3 Rivers Tele. Coop. v. U.S. West Communications, Inc., 2003 U.S. Dist. LEXIS 24871 at *67 (D. Mont. 2003) ("3 Rivers"). Accord, Union Tel. Co. v. Qwest Corp., slip op., No. 02 CV 209B at 26, 34 (D. Wyo. Sept. 19, 2003).

terminates in the same MTA."[25] In Atlas Telephone Co. v. Corporation Commission of Oklahoma, the court held that the FCC's classification of "mobile intraMTA traffic" as "local" as opposed to "toll" (i.e., interexchange or long distance) traffic applies "without regard to whether those calls are delivered via an intermediate carrier."[26]

The rulings by the FCC and the courts discussed above make it clear that neither Southwestern Bell nor any other terminating LEC is entitled to tariffed long distance access charges for transporting and terminating intraMTA (i.e. local) calls placed by end user customers of third-party wireless carriers to end user customers served by Southwestern Bell or any other terminating LEC that transit VarTec's facilities. Instead, Southwestern Bell and any other terminating LEC may seek section 251(b)(5) compensation, pursuant to negotiated or arbitrated (should negotiations fail) interconnection agreements, from the third-party wireless carriers serving the end user customers placing the calls. Accordingly, VarTec respectfully requests a ruling by the FCC declaring that CMRS provider originated intraMTA calls that VarTec delivers to enhanced service providers, such as PointOne or Transcom, and other carriers are exempt from Southwestern Bell's and any other terminating LEC's tariffed access charges.

IV. Southwestern Bell and Other Terminating Local Exchange Carriers Are Required to Pay VarTec for the Transiting Service VarTec Provides When Southwestern Bell and the Other Local Exchange Carriers Terminate IntraMTA Calls Originated by a CMRS Provider.

The FCC addressed the compensation due transiting carriers like VarTec in its Texcom decisions.[27] At issue were intraMTA calls that originated on the networks of third-party carriers,

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25 3 Rivers at *68-69.

26 Atlas Telephone Co. v. Corporation Commission of Oklahoma, 309 F. Supp.2d 1299, 1310 (W.D. Okla. 2004).

27 Texcom, Inc.v. Bell Atlantic Corp., 16 FCC Rcd. 21493 (2001) ("Texcom Order"), recon. denied, 17 FCC Rcd. 6275 (2002) ("Texcom Reconsideration Order").

transited the network of Defendant GTE North, and terminated on the network of Complainant Answer Indiana, a CMRS provider. Texcom Order, ¶ 1. The FCC held that a transiting carrier "may charge a terminating carrier for the portion of facilities used to deliver transiting traffic to the terminating carrier. Thus, GTE North may charge Answer Indiana for the cost of the portion of these facilities used for transiting traffic, and Answer Indiana may seek reimbursement of these costs from originating carriers through reciprocal compensation."[28]

The facts presented by this petition are similar to those in the Texcom decisions. IntraMTA calls that originate on the networks of third-party CMRS carriers, transit VarTec's network and the networks of enhanced service providers and other carriers, and terminate on Southwestern Bell's network and the networks of other terminating LECs. Consistent with the Texcom decisions, VarTec requests that the FCC declare that the terminating carrier, Southwestern Bell or any other terminating LEC, is required to pay VarTec for the use of VarTec's facilities to deliver transiting traffic to the terminating carrier. Southwestern Bell and any other terminating LEC may then, consistent with the Texcom decisions, seek reimbursement of these costs from the originating CMRS carriers, through section 251(b)(5) reciprocal compensation.

CONCLUSION

For all the reasons set forth above, the Commission should enter a declaratory ruling that: (1) VarTec is not required to pay access charges to Southwestern Bell or any other terminating LEC when enhanced service providers, such as PointOne or Transcom or other carriers deliver the calls to Southwestern Bell and the other terminating LECs for termination, (2) any attempts by Southwestern Bell or any other terminating LEC, to collect access charges from VarTec in

[28] Texcom Reconsideration Order, 17 FCC Rcd. 6275, ¶ 4, citing 47 U.S.C. § 251(b)(5) and 47 C.F.R. § 51.701.

contravention of its tariff violates sections 201(b) and 203(c) of the Communications Act, (3) such calls are exempt from the payment of access charges when they are originated by a CMRS provider and do not cross MTA boundaries, and (4) Southwestern Bell and any other terminating LEC is required to pay VarTec for the transiting service VarTec provides when Southwestern Bell and the other terminating LECs terminate intraMTA calls originated by a CMRS provider.

Respectfully submitted,

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